BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	CC Docket No. 96-45
	[DA 98-2]
Federal-State Joint Board on Universal Service	(Report to Congress)

COMMENTS OF THE STATE MEMBERS OF THE § 254 FEDERAL-STATE JOINT BOARD ON UNIVERSAL SERVICE

Pursuant to § 1.49, 1.415, and 1.419 of the Federal Communications Commission's ("FCC" or "Commission") Rules of Practice and Procedure, 47 C.F.R. §§ 1.49, 1.415, and 1.419 (1997), the five State Members of the Federal-State Universal Service Joint Board ("State Members")[1] respectfully submit the following comments addressing the FCC Common Carrier Bureau's January 5, 1998 Public Notice DA 98-2 titled "*Common Carrier Bureau Seeks Comment for Report to Congress on Universal Service Under the Telecommunications Act of 1996*" released in the above-captioned proceeding.

The 1998 appropriations legislation for the Departments of Commerce, Justice, and State requires the FCC to submit a report to Congress on implementation of the universal service provisions of the *Telecommunications Act of 1996*, Pub. L. No. 104-104, 110 State. 56 (1996) ("Act" or "'96 Act"), by April 10, 1998. In this proceeding, the FCC seeks comment on the extent to which FCC interpretations of specified sections of the '96 Act are consistent with the plain text of the statute.

[1]The Honorable Julia Johnson, Chair of the Florida Public Service Commission, The Honorable Laska Schoenfelder, Commissioner with the South Dakota Public Utilities Commission, The Honorable David Baker, Commissioner with the Georgia Public Service Commission, The Honorable Russell Frisby , Chair of the Maryland Public Service Commission, and the Honorable Martha Hogarty, Public Counsel, State of Missouri.

I. Introduction

On November 5, 1996, the Federal-State Universal Service Joint Board issued a *Recommended Decision* on how the Act's universal service provisions should be implemented. This decision was the result of thousands of hours of analysis, discussion, and deliberation among the State and Federal Joint Board commissioners and staff. The Commission used the *Recommended Decision* as the basis for many of its final determinations in the May 8, 1997 *Universal Service Order.*

State Members generally believe the Commission should be commended for its efforts to implement the universal service provisions of the '96 Act. Facing a host of complicated and controversial issues and operating under very tight time constraints, the FCC has already implemented extensive changes to traditional policy designed to keep basic telephone service affordable for all Americans. As Congress anticipated, these changes were necessary to adjust the regulatory paradigm to the introduction of competition into the local telephone service market facilitated by other parts of the Act.

That the Commission implemented a great deal of the Joint Board's recommendations in its Universal Service Order supports our belief that many of those policy determinations are consistent with the plain language of the 1996 Act. *However*, we remain very concerned about the FCC's interpretations in a few areas. *Significantly, at least one of the issues raised in the notice – the diversion of federal universal service funds to reduce interstate access charges – was never presented to or considered by the Joint Board.* Since the release of the Order, we have continued to deliberate with the Commission in an attempt to reach a resolution on this and the other issues listed below. We note that several States have appealed or sought reconsideration of the FCC's decisions on several of these issues.

These comments first address some of the specific issue areas outlined for comment in the Public Notice. Later, there is a discussion of our continuing concerns about FCC interpretations not directly referenced in the Public Notice.

II. Discussion

A. Public Notice Issue 1: The definitions of "information service," "local exchange carrier," "telecommunications," "telecommunications service," "telecommunications carrier," and "telephone exchange service" in § 3, and the impact of the interpretation of those definitions on the provision of universal service to consumers in all areas of the Nation.

Response: State Members *generally* agree that the FCC's interpretations of the statutory definitions specified in the Notice are consistent with the plain language of the Act.

Discussion: The Notice asks for comments on the extent to which its interpretations of the above definitions are consistent with the Act. Although State Members have not scrutinized all FCC uses of the listed terms, we generally agree with many of the FCC interpretations we examined. For example, the Recommended Decision suggests (1) the direct adoption of the criteria listed in 214(e)(1) as the FCC regulation governing whether a carrier is eligible to receive universal service support, (2) that carriers meeting those criteria be eligible for support, regardless of that carrier's service technology, and (3) a list of services to be included in the definition of universal service and thus eligible for support. Each of these suggestions involved analysis of the Act's requirements as they relate to the terms listed in the Notice. The Commission adopted these specific suggestions in its Universal Service Order and State Members agree that, in this respect, the FCC interpretations of the Act related to the specified definitions are consistent with the Act's express terms.

B. Public Notice Issue 2: The impact of such application on universal service, and the consistency of the FCC's application of those definitions, including with respect to Internet access for educational providers, libraries, and rural health care providers under § 254(h).

Response: State Members (1) generally agree that the FCC application of the specified definitions to mixed and hybrid services is consistent with the Act's terms and (2) believe the FCC has consistently applied the specified definitions, including with respect to Internet access.

Discussion: The *Recommended Decision* addresses the requirements of § 254 with respect to the provision of (1) basic communications services and (2) advanced communications and information services to schools and libraries at discounted rates. State Members' concurrence in those recommendations were largely based upon our interpretations of the plain language of the Act.[2] Since the FCC adopted the Joint Board's recommendations in these areas, we believe that its interpretations of the Act are generally consistent with the plain language of the Act.

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[2]For instance, we recognized that § 254 defines the services to be supported for schools and libraries (S&Ls) in terms of "telecommunications services," "special," or "additional" services, and access to "advanced telecommunications and information services." Specifically, § 254(c)(3) states that "in addition to the services included in the definition of universal service under [c](1), the [FCC] may designate additional services for such support mechanisms for [S&L}...for the purposes of § [254](h)." Section 254(h)(2) states that "[t]he [FCC] shall establish competitively neutral rules to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all. . .[S&L]." We also considered the Congressional vision, as articulated in the Joint Explanatory Statement accompanying the Act, of what services should be included in § 254(h)(2)'s "advanced services." Congress said, "[T]he [FCC] could determine that...services that constitute universal service for {S&L] shall include dedicated data links and the ability to obtain access to educational materials...and information services which can be carried over the Internet." These sections allowed us to conclude that all telecommunications services, and not just certain specified services, should be available for discounts. We also found § 254(h)(2)(A) provided a broad framework for facilitating deployment of a variety of services (not just telecommunications) to S&Ls because the competitively neutral rules mandated by there are applicable to all service providers, not just telecom carriers. This approach is most consistent with an evolving competitive market, and will also have the dual benefits of (1) providing S&Ls with the greatest degree of flexibility in choosing their services and (2) eliminating the need for future and frequent Joint Board- FCC action to revise the list of permissible services as new services evolve.

State Members also joined in the recommendation that the FCC adopt a rule providing that discounts for Internet access shall be available to S&Ls pursuant to § 254(h)(2)(A). We agreed that Internet Service Providers (ISPs) and online service providers "rely to a large degree on existing telecommunications carriers for the underlying transport facilities that constitute the Internet's backbone, as well as for local loop connections to individual Internet servers and users." We believe that any attempt to disaggregate the network transmission component of Internet access from the information service component could undermine the competitive forces that currently characterize Internet access markets. Therefore, by adopting a rule that allows all Internet access costs to be eligible for discounts under § 254(h)(2)(A), S&Ls are afforded the flexibility they need to procure the most cost-effective Internet access arrangements. However, we declined to recommend that discounts be available for information services other than those included in the provision of access to the Internet. The availability of discounts on all telecommunications services in combination with the discounts for Internet access will give S&Ls access to the latest available technologies and a wealth of information and satisfy the access requirements of § 254(h)(2)(A). To allow more information services would unnecessarily increase the size of the fund.

We have, however, found what appears to be an inconsistency, or at least unclear wording, in the plain language of the Act regarding whether providers of service to rural health care institutions are required to be designated "Eligible Telecommunications Carriers" ("ETCs") in order to receive universal service support. This inconsistency is addressed in detail in State Members' response to Public Notice Issue 4 below.

C. Public Notice Issue 3: Who is required to contribute to universal service under § 254(d) and related existing Federal support mechanisms, and if any exemption of providers or exclusion of any service that includes telecommunications from such requirement or support mechanisms is appropriate.

Response: State Members reserve comment on this issue.

D. Public Notice Issue 4: Who is eligible under §254(e), 254(h)(1), and 254(h)(2) to receive specific federal universal service support for the provision of universal service, and the consistency with which the FCC has interpreted each of those provisions of § 254.

Response: There are three problems associated with "eligibility" as interpreted by the FCC's existing orders: (1) the inappropriate diversion of high cost funding from making basic phone service more affordable to reducing the cost of interstate long distance calls; (2) the overly prescriptive interpretation of §214(e); and (3) the FCC determination that carriers that service rural health care providers must be designated as "eligible telecommunications carriers"(ETCs).

(1) Current FCC orders inappropriately divert high cost funding to reduce interstate access charges rather than continue contributions designed to keep basic local service rates low.[3]

The FCC has carefully defined a set of basic *intrastate* telecommunications services as "universal service" under the Act.[4] While *interstate* toll services are mentioned, restriction or blocking of such *interstate* services is permitted and even mandated by the FCC in some circumstances as a strategy for promoting universal service.

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[3]The Honorable Russell Frisby, a State Member and the Chairman of the Maryland Public Service Commission, does not join in this argument.

[4]*In the Matter of Federal-State Joint Board on Universal Service*, "First Report and Order", CC Docket No. 96-45, FCC 97-157 (rel. May 8, 1997), (*"Universal Service Order"*). at 8807, ¶ 56.

State Members submit that the FCC-defined *intrastate* services clearly represent the type of services that Congress targeted for high cost support in the Act.

However, the FCC has determined that all universal service support in high cost areas must be used to reduce the interstate access charges paid by interexchange carriers.[5]

State Members[6] respectfully suggest that in so doing, the FCC has ignored Congress's intent that it take action to achieve affordable basic local telephone service in the subject high cost areas.[7] State Members oppose the Commission's plan to channel the benefit of universal service support to interstate access charge rate reductions. The plan to offset universal service support by interstate access reductions radically revises the current support mechanism that is focused on ensuring affordable rates for basic local services. We believe the FCC's approach is inconsistent with the Act's requirements (1) for Federal fund support to maintain affordable rates in "rural, insular and high cost areas" and (2) limiting the use of such funds to the "provision, maintenance, and upgrading of facilities and services for which the support is intended." 47

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[5]In its May 16, 1997 "First Report and Order", in the proceeding captioned *In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges*, FCC 97-158, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, at ¶ 381, ("*Access Order*"), the FCC states: "Consistent with our decision in the Universal Service Order to fund only interstate costs through the federal universal service fund, we direct incumbent LECs to use any...support received from the new universal service mechanisms to reduce or satisfy the interstate revenue requirement otherwise collected through interstate access charges." The subsequent October 7, 1997, Notice of Proposed Rulemaking, *In the Matter of Jurisdictional Separations Reform and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, reiterates in ¶ 100 that: "Consistent with the Universal Service Order, federal support received by ILECs for service to rural, insular, and high cost areas would be directly assigned to the interstate jurisdiction because it is only intended to support the federal share of the costs of providing high cost service, and because such support is intended to offset ILECs' interstate revenue requirement." The *Access Order* was appealed to the 8th Circuit U. S. Court of Appeals in *Southwestern Bell Telephone Co. v. FCC*, Case No. 97-2618. The FCC's allocation of Universal Service Funds to reduce interstate access charges has been raised in that appeal.

[6]State member and Maryland Commissioner Russell Frisby does not join in this argument.

[7] See, 47 U.S.C. § 214(e) (1996). In the *Universal Service Order*, at ¶ 134, the FCC adopts the §214(e)(1) statutory criteria as the rules for determining whether a carrier is eligible to receive universal service support. The order goes on to conclude in ¶ 135, that §214(e)(2) does not permit the FCC or the States to adopt additional criteria for designation as an eligible carrier. Later, the order concludes, in ¶¶ 161-69, that a carrier that offers any of the services designated for universal service support, either in whole or in part, over facilities that are obtained as unbundled network elements, satisfies the statutory "own facilities" requirement for eligibility."

U.S.C. §§ 254(b)(4), 254(e).

(2) The *Universal Service Order* includes an overly prescriptive interpretation of §214(e).

State Members believe that, by adding significantly to the criteria outlined in the Statute, the FCC has adopted an overly prescriptive interpretation of § 214(e).

Section 214(e) specifically delegates authority to State commissions for the designation of eligible telecommunications carriers. The *Universal Service Order*, however offers an extensive discussion of its view of the meaning of "owned" facilities, an issue which the State commissions are clearly given authority to decide.

Section 214(e)(5) defines a service area for non-rural carriers to be "a geographic area established by a *State commission* for the purpose of determining universal service obligations and support mechanisms." However, the *Universal Service Order*, at ¶ 184, specifically circumscribes this clear delegation of discretion to States by concluding that "service areas should be sufficiently small to ensure accurate targeting of high cost support and to encourage entry by competitors."

Whether these FCC pronouncements are correct policy choices is not the issue. The question is whether in making these pronouncements, the FCC exceeded the role that Congress assigned to it. It appears that, at least in these two instances, the FCC should revise the language and conclusions of its orders to more accurately reflect the requirements of the Act. State Members contend that the Act clearly gives the states the responsibility to rule on ETC applications.

(3) The FCC's interpretations regarding support for providers of service to rural health care facilities appear to be inconsistent with Congress' intent, but not the plain language of the Act.

Section 254(h)(1)(A) pertains to general requirements for the provision of services to rural health care providers, while § 254(h)(1)(B) pertains to general requirements for the provision of services to schools and libraries. While the language in the two paragraphs is similar,[8] the Commission's interpretation of the plain language appears to be as follows: because the two paragraphs are similar and only § 254(h)(1)(B) explicitly exempts providers of service to schools and libraries from the requirements of § 254(e), such exemption does not apply to carriers providing service to rural health care providers.[9] Therefore, carriers providing telecommunications services to rural health care providers may not receive reimbursement from the universal service fund unless they are designated ETCs, as required by § 254(e).

Since Congress imposed similar obligations on providers of services to schools and libraries and rural health care providers in terms of the types of services that are eligible and how the funds are to be administered, we believe it also intended the § 254(e) exemption apply to providers of telecommunications to rural health care providers. However, one could construct an argument that the FCC's interpretation is consistent with a literal reading of the statutory text. To the extent Congress agrees that the text cannot be construed to achieve the obvious Congressional intent, it may wish to consider a technical correction. Otherwise, health care

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[8] Section 254(h)(1)(B) (applying to receipt of support by providers of services to schools and libraries) states, in part: "A...carrier providing service under this paragraph shall-- (I) have an amount equal to the amount of the discount treated as an offset to its obligation to contribute to the mechanisms to preserve and advance universal service, or (ii) notwithstanding the provisions of subsection (e) ..., receive reimbursement utilizing the support mechanisms to preserve and advance universal service. § 254(h)(1)(A) (applying to receipt of support by providers of services to rural health care providers) states, in part: "A ....carrier providing service under this paragraph shall be entitled to have an amount equal to the difference, if any, between the rates for services provided to health care providers...and the rates for similar services...treated as a service obligation as a part of its obligation to participate in the mechanisms to preserve and advance universal service."

[9] In the *Universal Service Order*, the FCC cites § 254(e) , which states that "only an eligible telecommunications carrier designated under § 214(e) shall be eligible to receive specific Federal universal service support." A footnote to this statement points out that § 254(h)(1)(B)(ii) specifically "states that...carriers [that] provide service to [S&L] under § 254(h)(1)(B) shall receive support 'notwithstanding the provisions of [§ 254(e)].'" This footnote implies that providers of services to S&Ls are the *only* providers exempt from the ETC requirement.

providers in some areas may not be able to receive the benefits of § 254 because providers in their areas are unwilling or ineligible to become ETCs. Without such designation, under the current FCC interpretation, they may not be eligible to receive universal service support.

E. Public Notice Issue 5: The Commission's decisions regarding the percentage of universal service support provided by federal mechanisms and the revenue base from which such support is derived.

Response: Both of the following sub-issues raised in this issue statement are of intense interest to all of the State Members:

- The 75-25% State-Federal High Cost Funding split proposed by the FCC after the Joint Board's recommendation; and
- The need to assure, whatever the revenue base used for funding, that States are able to continue intrastate universal service programs.

The historical availability of Federal universal service funding through the FCC's separations rules has allowed local exchange telephone companies to provide intrastate service to high-cost rural areas at affordable rates. Both the anticipated source of revenues for this program and the *Universal Service Order's* proposal to set a 75 percent State and 25 percent Federal split of jurisdictional responsibility for recovery of the High Cost Fund generated much discussion among the State Members of the Joint Board.

All Members have concerns with *either* the inclusion of intrastate revenues in the proposed funding sources *or* the 75-25% split proposed by the FCC as part of its current plan for supporting high cost areas. However, State Members remain very interested in participating in further discussions with the Commission, Congress, and other stakeholder groups to resolve the challenges that remain in implementing the Act's universal service vision.

F. Other Issues That Should Be Addressed in the Report to Congress

As explained earlier, State Members believe the Commission in many instances complied with Congressional intent in its implementation efforts. However, there are areas where we strongly disagree with the FCC's interpretations. The following discussion describes one area in which we believe the FCC incorrectly interpreted the plain language of the Act, but that was not directly addressed in the questions in the Public Notice.

Section 254(k) – Which Concerns Cross-subsidization and Recovery of Joint and Common Costs of Facilities Used to Provide Universal Services is NOT Self Executing; Issues Raised by this § Are Appropriately the Subject of a Federal State Joint Board Recommendation.

Section 254(k) concerns the recovery of joint and common costs of facilities used to provide universal service. The State Members recognize that the Commission, in Part XII of the Order pertaining to interstate subscriber line charges (SLCs) and carrier common line (CCL) charges, stated that it had reviewed the Joint Board Recommended Decision and generally followed through on the Decision as far as the SLC/CCL issues were concerned. The FCC agreed that long-term support (LTS) is a form of universal service and removed it from the CCL access charges. Thus, LTS access payments were restructured as universal service payments. The Commission also decided not to raise the SLC cap on single-line residential and business lines. The Commission recognized, as the Joint Board proposed, that concern about affordability prevents raising the SLCs for these customers. However, the Commission declined to abolish SLCs for these customers, citing the Lifeline provisions of the Order, which it argued are designed to increase affordability for low income residential customers.

The Commission acknowledged the Joint Board proposal that single-line residential and business line SLCs be reduced. The Commission explained that, since the Joint Board only

recommended a SLC reduction if the high cost fund is funded through interstate and intrastate revenues, SLC reductions were not warranted because the Order requires funding of the high cost fund only through collection of interstate revenues.

Regarding the § 254(k) issue specifically, the Joint Board has proposed on numerous occasions that the Commission refer the § 254(k) issue to the Joint Board for analysis and recommendations. In the Universal Service Order, the Commission suggested that it will "revisit issues related to loop recovery in light of further recommendations from the Joint Board in this proceeding and the Separations Joint Board." However, § 254(k) was not specifically mentioned. In a footnote, the Commission proposed that it will address § 254(k) in a separate proceeding without providing more specific detail. In short, the Universal Service Order gave us little comfort that the issue would be addressed in a manner we believe the Act mandated.

Concurrent with the release of the Universal Service Order, the Commission issued an order on the § 254(k) issue. We were disappointed that the order simply reiterated the plain language of § 254(k), which states:

> A telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition. The Commission, with respect to interstate services, and the States, with respect to intrastate services, shall establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services.

The Commission's order restated the above language but made no attempt to establish cost allocation rules, accounting safeguards, or guidelines. The Order recounted past efforts by the Commission to address cost allocation issues, and noted that ILECs may attempt to take an unfair advantage in a partially competitive environment by shifting excessive costs to services for which there is no alternative. The Commission stated that it is difficult, if not impossible, to

determine how to apportion those joint and common costs, and explained how costs can be considered joint, common, and incremental. The application of these concepts to loops was not discussed, but a loop would seem to qualify as a common cost. The Commission noted that only ILECs would have the market power to violate § 254(k), but that all carriers come under this prohibition.

The Commission seemed to think that restating the statutory language was sufficient because the language itself prohibits the cross-subsidization of competitive services with services included in the definition of universal service. There was no discussion as to how the prohibition against cross-subsidization and the requirement that universal services bear no more than a reasonable share of joint and common costs would apply to the issue of how the recovery of common line costs should be shifted between the CCL and the SLC. The Commission found that no notice or comment was necessary, saying that the Commission may dispense with notice and comment where notice and comment are "impractical, unnecessary, or contrary to the public interest." The Commission did say, however, that over time it will have to make sure that the § 254(k) mandate is enforced.

We continue to be concerned about the Commission's refusal to refer 254(k) issues to the Joint Board and about its apparent refusal to initiate proceedings to address cost allocation and accounting safeguard mechanisms to ensure that § 254(k) is enforced. Congress created through the Joint Board a Federal-State partnership in order to generate a recommended set of "rules, accounting safeguards, and guidelines" to fulfill the mandate of § 254(k). We do not believe that the Commission's interpretations in this area are consistent with the plain language of the Act. The language says that the Commission shall establish any necessary rules, safeguards and guidelines to ensure that the language of the law is enforced. By its own admission in the

254(k) order, the Commission acknowledged that the potential for abuse on the part of the ILECs in this regard exists, and the Commission stated that over time it will have to ensure that the § 254(k) mandate is enforced. Yet, the Commission seemed to imply that it did not believe that any rules, safeguards, or guidelines were necessary now, and that in fact they would be "impractical, unnecessary, or contrary to the public interest." These statements seem to contradict themselves.

We contend that now, before competition is fully established, is the most appropriate time for these issues to be addressed. To do otherwise may result in less competition developing than would otherwise be the case. Further, even if competition does develop, abuse of this mandate would result in higher prices for consumers for noncompetitive services than are necessary or appropriate, and would also result in consumers paying more for universal service support than is necessary or appropriate.

III. Conclusion

The Commission's interpretations implementing many subparts of the universal service provisions of the Act *were* consistent with the Congressional intent and the statutory language. State Members support those decisions. However, as discussed above, the FCC did misinterpret several provisions that are of particular concern to States.

Four new FCC commissioners have been appointed since the release of the orders discussed in these comments. Discussions with these new Commissioners are underway and State Members remain optimistic that the newly constituted Commission will take steps to address many of our concerns. State Members pledge to continue to work with all five commissioners and the Commission staff to meet the challenges that remain and also to effect the

changes to the existing policies needed to carry out Congress's intent and the express terms of the statute.

Respectfully Submitted,

State Members of the §254 Federal State Joint Board

The Honorable Julia Johnson [State Members "Chair"]
FLORIDA PUBLIC SERVICE COMMISSION

The Honorable David Baker
GEORGIA PUBLIC SERVICE COMMISSION

The Honorable Russell Frisby
MARYLAND PUBLIC SERVICE COMMISSION

The Honorable Laska Schoenfelder
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

The Honorable Martha Hogarty
PUBLIC COUNSEL FOR THE STATE OF MISSOURI

JANUARY 26, 1998

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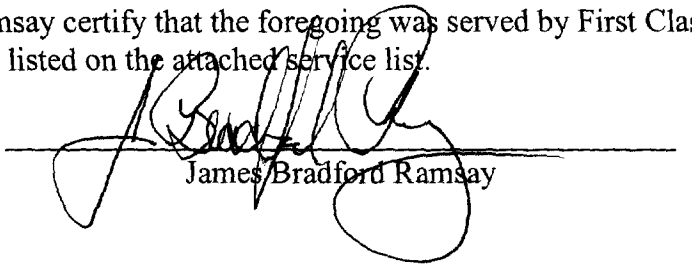

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